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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

APRIL RIVARD, *et al.*,
Petitioners,
v.
CHICAGO FIRE FIGHTERS UNION,
LOCAL NO. 2, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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BRIEF IN OPPOSITION OF THE RESPONDENT INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO

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STATEMENT OF THE CASE

In 1981 and 1982, petitioners filed suits in the Circuit Court of Illinois to recover damages for personal and property injuries alleged to have resulted from fires at their residences. These fires occurred during a strike by employees of the Chicago Fire Department. Petitioners sued the local and international unions to which the fire department employees belonged, as well as three officers of the local union in both their individual and representative capacities ("the respondents."). Other than the three

local union officers, petitioners did not name any of the union members as defendants. On motion of the respondents, the Circuit Court dismissed the actions because the respondents, as voluntary unincorporated associations or officers of same, were not subject to suit under the common law of Illinois. Pet. App. A-19-A-22.[1]

Petitioners appealed this ruling to the Illinois Appellate Court. While their appeal was pending, the Illinois General Assembly enacted a statute abrogating the common law and providing that from that point forward unincorporated associations could sue and be sued in the State. The Illinois Appellate Court held that this new statute should be applied retroactively and reversed the judgment of the Circuit Court. Pet. App. A-9-A-14.

Respondents appealed to the Supreme Court of Illinois, which reversed the Appellate Court and reinstated the judgment of the Circuit Court. Pet. App. A-2-A-8. The state Supreme Court held the statutory change to be substantive in nature and that petitioners had not presented a sufficient basis for overcoming the clear language of the statute and the presumption of prospectivity which applies to substantive statutes. The Court found it unnecessary to treat the other grounds on which respondents had appealed.

Petitioners' request for rehearing was denied. Pet. App. A-1-A-2.

REASONS FOR DENYING THE WRIT

The purported basis for this Court's jurisdiction to entertain the petition is § 1257(3) of the Judicial Code. 28 U.S.C. § 1257(3). However, the petition does not satisfy the requirements of that provision of the Code.

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[1] The suits against the three officers in their individual capacities were not dismissed. The officers later successfully moved for summary judgment.

I. THE JUDGMENT BELOW DOES NOT DRAW INTO QUESTION THE CONSTITUTIONAL VALIDITY OF ANY STATE STATUTE

The Illinois Supreme Court decided this matter solely on the basis of statutory construction under the laws of Illinois. No treaty or statute of the United States was drawn into question. Likewise, no party contended that any state statute was repugnant to the U.S. Constitution. The petitioners' Constitutional argument, which was not addressed by the judgment below, was directed not at a statute, but at the State's continued adherence to the common law. Consequently, this Court is without jurisdiction to entertain the petition unless the abridgement of some Constitutional right has properly been raised.[2]

II. THE CONSTITUTION DOES NOT SPECIALLY SET UP ANY TITLE, RIGHT, PRIVILEGE OR IMMUNITY WHICH HAS BEEN AFFECTED BY THE JUDGMENT BELOW

In Illinois, prior to the enactment in 1983 of a statute to the contrary, the common law rule that an unincorporated association could not sue or be sued in its own name was in effect. After petitioners' lawsuits were dismissed based on this common law rule, the Illinois legislature enacted a statute permitting suits by and against unincorporated associations. Petitioners unsuccessfully argued before the Illinois Supreme Court that this statute should be applied retroactively to revive their suits.

The sole effect of the ruling below is to confirm the common law principle in Illinois that prior to 1983, suits brought by or against unincorporated associations in their own names were subject to dismissal because the associations were not recognized as legal entities for the

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[2] Indeed, the State court's failure to even address petitioners' Constitutional arguments suggests that this Court should refrain from exercising jurisdiction over the petition. See, *Ellis v. Dixon*, 349 U.S. 458 (1955).

purposes of participation in litigation at law. Suits in Illinois for claims arising prior to that date must be brought by or against the members of the association, rather than the association itself.

The Constitution creates no right to sue an association, as opposed to its members. This Court long ago recognized that "at common law, an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the name of its members, and their liability had to be enforced against each member." *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344, 385 (1922). Accord: *Denver and Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 559 (1967); *Moffat Tunnel League v. United States*, 289 U.S. 113, 118 (1933) ("unless authorized by statute, [unincorporated voluntary associations] have no capacity to sue."). As the Court recognized in *Brown v. United States*, 276 U.S. 134, 140 (1928), to overcome the general common law rule, "[m]any of the states have adopted statutes expressly providing that such associations may be sued." Further, even absent such express statutory provision, "[s]uch a suit may be maintained in virtue of a necessary implication arising from statutory provisions although the statute does not in terms so provide." *Id.*

In *Coronado*, this Court implied from the breadth of *federal* regulation that unincorporated labor organizations are suable in *federal* courts for their acts. Similarly, in *Brown*, the Court implied from the Sherman Anti-Trust Act the right to subpena an unincorporated association of furniture manufacturers in conjunction with an antitrust suit. Conversely, in *Moffat Tunnel League*, the Court rejected an unincorporated association's challenge to an Interstate Commerce Commission ruling where no similar implication could be made from the pertinent federal statute.

The judgment below turns on an interpretation of an Illinois statute specifically allowing suits against unincorporated associations. There was no dispute that the statute was intended to change the common law of Illinois. The issue was the effective date of the statute's application. Petitioners asserted that the statute should be applied retroactively to permit their pre-enactment suits against respondent unincorporated labor unions; respondents contended that the statute should be deemed prospective in application only. The Supreme Court of Illinois determined that the change effectuated by the statute was substantive in nature and that the clear language of the statute indicating prospectivity could not be overcome by legislative history relied upon by petitioners. Thus, because their claims arose prior to the enactment of the statute, the common law rule was applied to petitioners' suits and they were dismissed.

Petitioners' plight is of their own making. Rather than institute litigation against the members of the respondents, they elected to sue the associations themselves. Even after being rebuffed in the trial court, petitioners made no effort to amend their complaints or initiate new ones. It was not the common law which barred the courthouse door to petitioners. Rather, petitioners themselves elected not to proceed in the manner which the precedent of both this Court and the Courts of Illinois had long enunciated must be followed. They cannot now be heard to complain of errors of a Constitutional dimension arising solely from their own choice of strategy.

In *Coronado*, this Court implicitly recognized that the decision to abrogate the common law rule was reserved for each individual jurisdiction. Referencing both the legislative and equity changes which had preceded *Coronado*, a unanimous Court noted that "this has had its influence on the law side of litigation, so that, out of the very necessities of the existing conditions and the utter impossiblity of doing justice otherwise, the suable char-

acter of [an unincorporated labor union] has come to be recognized *in some jurisdictions* . . . ." 259 U.S. at 388. (Emphasis added). In *Coronado*, the Court added the federal courts to those jurisdictions. Illinois did not elect to join the list until 1983.

The petition does not raise a matter of substantial federal concern. There are no conflicting federal or state court decisions. The impact of the judgment below is limited to Illinois, and probably to petitioners themselves.

Petitioners' due process arguments are wholly without merit. The common law rule did not deny petitioners meaningful access to the courts or a right to a hearing, they did it to themselves. They could have proceeded to obtain an adjudication of their claims by suing the persons whom the common law recognized as answerable to them, assuming the claims had merit. The petitioners, alone among litigants in Illinois, declined to do so.[3]

Petitioners' equal protection claim is also unavailing. They have not been singled out for treatment different from others. No litigant under the common law was permitted to sue an association. The common law applied equally to everyone. When the common law was changed, the effect was the same for all litigants.

Simply stated, the petition satisfies neither the jurisdictional constraints of Section 1257(3) of the Judicial Code, 28 U.S.C. 1257(3), nor Rule 17 of the Rules of this Court. It should be denied.

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[3] Petitioners admit that the decisions of this Court clearly hold that the Seventh Amendment does not apply to the states. This issue was not addressed by the courts below, making this record an inappropriate one for this Court to take up the matter. Moreover, even assuming the application of the Seventh Amendment to the states, petitioners' failure to obtain a jury trial flowed directly from their failure to institute a viable action, despite their undenied ability to do so.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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